

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 2ND MARCH 2007 / 11TH PHALGUNA 1928

SA.No. 152 of 1993

AS.5/1989 of SUB COURT, PAYYANNUR
OS.73/1985 of MUNSIFF COURT, THALIPARAMBA
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APPELLANT: APPELLANT/2ND DEFENDANT

EDAKKADANKANDI CHOTTI MAMMU
S/O.ADAM, AGED 51 YEARS
RESIDING AT KALLIAD AMSOM DESOM.

BY ADV. SRI.T.A.RAMADASAN

RESPONDENTS:RESPONDENTS/PLAINTIFF/1ST DEFENDANT

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1. ODUKKAN VEETTIL MADHAVI AMMA
D/O.ARIYAN, KALLIYAD AMSOM
AND DESOM, PADIYOOR PANCHAYAT.
 2. THACHAN NARAYANAN,
S/O.POKKI, KALLIYAD AMSOM,
ELATHOOR DESOM.

BY ADV. SMT.VIDHYA. A.C

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 2/3 /2007, THE COURT ON SAME DAY DELIVERED THE
FOLLOWING:-

M.SASIDHARAN NAMBIAR, J.

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S.A. NO.152 OF 1993

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Dated this the 2nd day of March, 2007

JUDGMENT

Second defendant in O.S.73/85 on the file of Munsiff Court, Taliparamba is the appellant. First respondent is the plaintiff and second respondent the first defendant. Suit was filed seeking recovery of possession of plaint schedule building with arrears of rent. First respondent contended that property originally belonged to Kalliyad tarwad in jenm right and she obtained possession of property under an oral lease and he constructed the building and later purchased jenm right as per order in O.A.414/1976 of Irikkur Land Tribunal. It was also contended that while so the building was rented out to first defendant on a monthly rent of Rs.10/- on 20.2.1973 and he has been in possession of the building as a tenant but defaulted to pay the rent subsequent to 1981 and therefore she sent Ext.A4 notice terminating the tenancy and demanding

surrender of possession, but first defendant did not surrender the building or pay the rent. It was contended that when first defendant attempted to trespass into the property, plaintiff was compelled to file O.S.73/82 before Munsiff Court seeking a decree for injunction and though first defendant denied the title learned Munsiff upholding the title of plaintiff granted a decree for injunction. It was also contended that first defendant thereafter filed an application before the Land Tribunal claiming to be a kudikidappukaran without impleading plaintiff and knowing about it plaintiff got himself impleaded in that O.A.and under Ext.A3 order the application was dismissed and contention of first defendant is in collision with appellant and therefore plaintiff is entitled to the decree. First defendant filed a written statement admitting that the property originally belonged to Kalliyad tarwad but denying the right of plaintiff under the lease. It was contended that building was constructed by Payyar who granted a lease of the building to first defendant and he was continuing

in possession of the building as a tenant under Payyar and while so, Payyar sold the property to appellant and he is continuing in possession as tenant under the appellant. Appellant was impleaded. Appellant filed a written statement reiterating the contentions raised by first defendant. According to appellant, the building though originally belonged to Kalliyad tarwad it was outstanding of lease in favour of Payyar and while so Payyar constructed the building and thereafter granted the building on a monthly rent of Rs.3/- to first defendant and later Payyar transferred the right in favour of appellant and he is the absolute owner of property and plaintiff is not entitled to the decree sought for. It was contended that decree in O.S. 73/82 is not binding on the appellant as appellant was not a party therein and the suit is only to be dismissed.

2. Learned Munsiff framed the necessary issues. On the evidence, learned Munsiff found that plaint schedule property belonged to plaintiff under Ext.A6 purchase certificate issued by Land Tribunal and Exts.A1 and A2 decree and judgment in

O.S.73/82 establish that plaintiff has title to the property eventhough first defendant had denied the title of plaintiff. Learned Munsiff granted a decree holding that under Ext.A3 order of Land Tribunal, title of plaintiff was established. Learned Munsiff also found that there is no evidence to prove that plaint schedule property belonged to Payyar as claimed and even Payyar was not examined. In such circumstance, case of appellant was rejected upholding the case of plaintiff and a decree for recovery of possession of the building with arrears of rent was granted.

3. The decree and judgment was challenged before Sub Court, Payyannur by appellant. First defendant did not challenge the decree, though decree is for recovery of possession of the building from the possession of first defendant with arrears of rent. Learned Sub Judge on reappreciation of evidence confirmed the decree and judgment and dismissed the appeal. It is challenged in this Second Appeal.

4. The following substantial questions of law

were formulated.

1) Whether the findings of courts below that Ext.A1 and A2 judgment and decree in a suit instituted by plaintiff against first defendant is binding on appellant, who is setting up a rival title, is sustainable?

2) Whether courts below erred in upholding the title of plaintiff and rejecting the title set up by second defendant?

5.Learned counsel appearing for appellant and first respondent were heard.

6. The arguments of learned counsel appearing for appellant was that though plaintiff set up tenancy right under Kalliyad tarwad, apart from producing a purchase certificate, there was no evidence to prove the oral lease and courts below on the evidence should have found that plaintiff did not establish his title. It was argued that when appellant was not a party to O.S.73/82, the finding in Ext.A2 judgment should not have found binding on appellant to deny the title claimed by him. It was argued that courts below should have found that title vests with appellant and first

defendant was originally a tenant under Payyar and the right of Payyar was transferred to appellant under Ext.B4 and plaintiff has no title to the building and the decree and judgment is unsustainable.

7. Learned counsel appearing for first respondent argued that though appellant set up a title obtained from Payyar, no evidence was adduced to prove that there was a lease in favour of Payyar and even Payyar was not examined and courts below appreciated the evidence in the proper perspective and rightly found that appellant has no right or title to the property and the building belongs to plaintiff and was rented out to first defendant and therefore the appeal is only to be dismissed.

8. The property admittedly originally belonged to Kalliyad tarward in jenm right. It was outstanding in the possession of tenant. When plaintiff contended that plaint schedule property was outstanding in her possession as per an oral lease, appellant contended that it was outstanding in possession of one Payyar and from Payyar he

obtained the title. Ext.A6 is the purchase certificate obtained by plaintiff. Ext.B3 is the purchase certificate issued by Land Tribunal in favour of Payyar, the assignor of the appellant. According to appellant, he purchased property from Payyar under Ext.B4 sale deed dated 28.5.1982. Ext.A2 decree in O.S.73/82, a suit filed by plaintiff seeking a decree for injunction alleging that first defendant is a building tenant and attempted to trespass into plaint schedule property shows that the said suit was filed on 3.4.82. It also shows that an emergent order was passed in favour of plaintiff on that day. Ext.B4 sale deed was executed immediately thereafter. In Ext.A1 suit first defendant had filed a written statement contending that he is not the tenant of plaintiff but of Payyar and thereafter rights of Payyar was transferred in favour of appellant herein and he is a tenant of the appellant. Ext.B4 assignment deed was executed thereafter, evidently to show that first defendant is a tenant of the appellant. Eventhough in the written statement filed by both the appellant and

first defendant it was stated that monthly rent payable is Rs.3/-, Ext.B4 does not show the rate of rent. It only shows that building was outstanding in the possession of first defendant as a building tenant. Ext.B4 does not disclose when the lease was granted. It is also to be born in mind that, though appellant was not a party to O.S. 73/82, learned Munsiff upheld the case of plaintiff and granted a decree for permanent prohibitory injunction against first defendant from trespassing into the plaint schedule property. If appellant is the landlord of first defendant as claimed by them, he would have definitely known about the decree. Subsequently first defendant filed O.A.106/82 before Land Tribunal, Irikkur claiming kudikidappu right. He did not implead plaintiff therein. Instead he impleaded appellant as first respondent and Payyar as second respondent. That O.A was filed in 1982. Evidently it was filed immediately after institution of O.S. 73/82. It is seen from Ext.A3 order that plaintiff got herself impleaded as third respondent and disputed the kudikidappu right

claimed by first respondent. It is pertinent to note that Ext.A3 does not show that the right of kudikidappu claimed by first defendant was denied or disputed by appellant. Moreover, the very fact that contention of appellant in the written statement was that rate of rent payable is only Rs.3/- is sufficient enough to show that appellant was in favour of granting kudikidappu right to first defendant. Ext.A3 order also shows that Ext.A1 and A2 judgments in O.S.73/82 as well as report of the Commissioner submitted in that suit were marked as Exts.B1 to B4 and B6 apart from the oral evidence tendered by first defendant as PW1 in O.S.73/82. Appellant was therefore aware of the decree granted in favour of plaintiff in O.S.73/82. It cannot be disputed that by virtue of Exts.A1 and A2 judgment and decree, a cloud has been cast on the alleged title of appellant. In spite of that, appellant did not take any step to remove the cloud cast on the alleged title by filing a suit for declaration of title. Instead after getting impleaded in the suit filed by plaintiff a contention has been raised that he

has got absolute title to the property under Ext.B4.

9. As rightly found by courts below, even Payyar who is alleged to be the tenant of the property was not examined. The only evidence tendered by appellant was his own evidence as DW1. Evidence of DW1 establish that he does not know anything about the lease. His evidence also shows that there are hundred acres shown in the survey number of the plaint schedule property. Even if Payyar was a cultivating tenant in respect of some property in that survey number, it does not mean that Payyar was a cultivating tenant of the plaint schedule property.

10. Exts.A1 decree and judgment shows that a Commission was taken out in O.S.73/1982 and plaint schedule property was identified as the property covered under the purchase certificate. Evidence establish that plaint schedule property is the property belonging to plaintiff under Ext.A6 purchase certificate and appellant has no right over the same.

11. Appreciating the entire evidence in proper

perspective, I find no reason to interfere with the factual findings of courts below. Appeal is only to be dismissed.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006